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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1501 137

BROTHERHOOD OF RAILWAY TRAINMEN, ET AL.

versus

TEXAS & PACIFIC RAILWAY COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT, ON BEHALF OF TEXAS-PACIFIC EMPLOYEES And ACCOMPANYING BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No.

BROTHERHOOD OF RAILWAY TRAINMEN, ET AL.

versus

TEXAS & PACIFIC RAILWAY COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of L. B. Adams, S. W. Allen, J. E. Bowie, Lee Carcara, E. A. Cazes, A. N. Dawson, W. L. Day, E. Doiron, J. B. Dotherow, Ted Francis, L. B. Grant, J. M. Hathorn, Jr., W. L. Higginbotham, F. M. Holsomback, D. T. Johnson, A. S. Laborde, Leo Lefebvre, H. W. Lucas, F. D. McKay, J. O. Melder, A. J. Melder, E. J. Mixon, G. M. Mize, N. Schlatre, L. S. Schlatre, L. R. Talbott, F. M. Trammell, C. E. Ward and M. H. Williams for review by this Court on writ of certiorari of a judgment

and decree of the Circuit Court of Appeals for the Fifth Circuit rendered on February 5, 1947, with respect, represents:

1.

STATEMENT OF THE MATTER INVOLVED.

This controversy originated in the United States District Court for the Western District of Louisiana upon a joint petition of the Texas & Pacific Railway Company, hereafter called Texas Company, and the Missouri-Pacific Railroad Company, hereafter called Missouri Company, seeking relief by declaratory judgment (Section 274D Judicial Code) as against the Brotherhood of Railroad Trainmen, hereafter called Brotherhood, and twenty-three individual employees of the said Texas Company, present applicants, hereafter called Texas employees, representing a minority group of the said Brotherhood. R. 2, et seq. The Brotherhood was joined both as a national association domiciled at Cleveland, Ohio, and through its local Rapides Lodge No. 856. The basis for the court's jurisdiction was alleged in paragraph II of the complaint, as follows:

> "This Court has jurisdiction of this action because the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, it is between citizens of different States, and it arises under the laws of the United States, namely, the Railway Labor Act of 1934, as amended (45 U. S. C. A., Section 151 to 164)". R. 4.

The said railways had consolidated their terminal operations in Alexandria, Louisiana where they had previously carried on independent and separate enterprises,

and in connection with said consolidation on June 2, 1927, had entered into a contract with the said Brotherhood, and with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, allocating and assigning crews out of the two groups of employees upon an equitable basis determined after nine months of a supervised testing of relative tonnage handled by said railways, so as to give to all Texas employees of the three brotherhoods approximately 45 per cent of the work required at any one time and to all of the Missouri employees of the three brotherhoods approximately 55 per cent. R. 12, et seq.; R. 63, et seq. This arrangement was shown to be permanent both by the steps which had preceded it as well as under the express terms of the said agreement. It had served as the basis for allocation and assignment unbroken down to the time of the present controversy. Admittedly, after the said consolidation all of said employees whether of the one group or the other were working upon one job under one supervising authority and with one paymaster. R. 149. Most of said employees, including practically all of present applicants, working in said consolidated terminal at the time of the present controversy had been hired subsequent to the said agreement of June 2, 1927. R. 154.

The present action was provoked by the Brotherhood of Railroad Trainmen alone. This brotherhood is the bargaining agency under the Railway Labor Act for the said Texas employees as well as for the Missouri employees. The purpose of the provoking action was to change the allocations as between the two groups of employees so as to allow 65 per cent to the Missouri employees and only 35 per cent to the Texas employees. R. 16.

This new agreement revising and reinterpreting the contract of June 2, 1927, was prepared by the said Brotherhood and presented to the railways for execution. R. 18. The other two brotherhoods did not participate. Thus, no change was or is proposed in the allocation of employees in the said terminal as to locomotive engineers or locomotive firemen and enginemen. As to these two groups, the allocation as between Texas employees and Missouri-Pacific employees is to remain as prescribed by the said agreement of June 2nd. Manifestly, the new agreement proposes a change that will result in a marked prejudice to the said Texas-Pacific employees, applicants here. The effect will be to deprive some of these men who now have regular jobs of all work and to force others on an irregular extra board. Decrease and in some instances complete loss of income will result and in all cases serious prejudice to seniority rights will occur. Actually in a number of cases men of the Texas-Pacific are to lose their jobs or are to be forced upon the extra board or are to suffer diminution in pay and loss of seniority rights and privileges to Missouri employees who have been subsequently employed upon the same job.

When the new contract was presented to the railways by the said Brotherhood the Texas employees who are applicants here instituted an action on June 5, 1944, in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, entitled *A. C. Bujol, et al., v. Missouri-Pacific Railroad Company, et al.*, No. 21,579 on the docket of that court for the purpose of having that court declare the manifest invalidity of the new agreement and to enjoin its execution. Serious charges of gross discrimination by the Brotherhood as against this minority

group were presented. R. 24, et seq. These included the charge that the new agreement was no more than an arbitrary political deal and collusive arrangement worked out between the officers, agents and representatives of the said Brotherhood and its Rapides Lodge which was composed principally of Missouri-Pacific employees; that a valid decision upon the issue of the proposed change arrived at and decreed by the three executives of the three brotherhoods in accordance with their respective conventions and constitutions had been ignored and that on the contrary the proposed change was predicated upon an invalid decision by the Board of Appeals of the Brotherhood of Railroad Trainmen alone dated November 16, 1943, which had been manipulated and controlled by the President of the Brotherhood in gross violation of the Brotherhood's Constitution and of its policy and convention arrangements with the other two brotherhoods; that the said Board of Appeals was without jurisdiction of the controversy, and its decision was null and void, and that further appeal which was attempted by the said minority group to the Board of Directors of the said Brotherhood and to its convention was unlawfully denied in violation of the Constitution and By-Laws of the said Brotherhood; and that in any event the proposed change in the agreement of June 2, 1927, would arbitrarily divest the said Texas employees of their contract rights, and would prejudice them in the serious respects noted above not only in violation of the said Brotherhood's Constitution and of its by-laws and conventional agreements but also in violation of the Fifth Amendment to the Constitution of the United States.

The unlawful discrimination so-charged was clearly of the same character as that treated with by this Court in

the decisions in *Steele v. Louisville & Nashville Railway Company*, 323 U. S. 192, 65 S. Ct. 226, 89th L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89th L. Ed. 187; and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89th L. Ed. 216.

In the state court the suit was dismissed for alleged lack of adequate citation of the nonresident Brotherhood and injunctive relief was denied. R. 47; R. 45. An appeal was prosecuted and is still pending in the Supreme Court of Louisiana, devolutive in character, but no issue of temporary or preliminary injunction is presented. The appeal there was sustained by the Supreme Court of Louisiana on a motion to dismiss filed by all of the respondents, A. C. Bujol, et al., v. Missouri Pacific Railroad Co., et al., No. 37,650, 20 So. (2) 608. As there was no suspensive relief in that case present counsel for the individual applicants addressed a letter to the said railways, R. 49, et seq., on June 26, 1944, stating in part, as follows, to-wit:

> "The purpose of this letter is to advise that petitioners intend, individually and collectively, to invoke all legal remedies available to them to enforce specific performance and legal adherence to the said contract, and in the alternative to sue in damages if the said contract is changed under said illegal decree." R. 51.

After a final judgment was entered in the lower court in that case counsel for the present individual applicants addressed a further letter to the said railways dated July 6, 1944, R. 54, et seq., stating that the said

individual applicants would prosecute the appeal to the Supreme Court of Louisiana and declaring the purpose of the parties to be:

> "to take any and all action available in this suit to enforce specific performance and legal adherence to the said contract (of June 2, 1927), and in the alternative to sue in damages if the said contract is changed under the said illegal decree of the Brotherhood of Railroad Trainmen."

Despite the pendency of the said appeal and the situation presented by these facts the said Brotherhood persisted in its contention that the said railways were required by the Railway Labor Act to amend and interpret the contract of June 2, 1927, so as to allow the proposed changes or suffer a heavy penalty for their willful failure to do so. R. 183. Faced with this dilemma, the said railways brought this action for declaratory judgment, praying by amended complaint, R. 123, et seq., that the Court declare:

> "(1) That plaintiffs are not required by law either to amend or to interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen;
>
> "(2) That plaintiffs are not required by law to confer, negotiate, or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning desire so to amend or interpret said contract of June 2, 1927, while the validity of said Brotherhood's actions and/or the authority of its officers, agents, or representatives so to amend or interpret said contract are being

challenged on the grounds and in the manner set forth in the foregoing bill of complaint;

"(3) That neither the Brotherhood of Railroad Trainmen or any person represented by it has or shall have any claim, demand, right, or cause of action whatsoever against plaintiffs, or either of them, for their refusal, jointly or severally, to amend or interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen, or for their refusal, jointly or severally, to confer, negotiate or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of said Brotherhood's actions and/or the authority of its officers, agents and representatives so to amend or interpret said contract are being challenged on the grounds and in the manner set forth herein.

"(4) In the alternative and in the event the Court should hold that plaintiffs are required by law to amend and/or interpret said contract of June 2, 1927, as desired by the Brotherhool of Railroad Trainmen, or should the Court hold that plaintiffs are required by law to confer, negotiate or bargain with officers, agents and representatives of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of the Brotherhood's actions and/or the authority of its officers, agents, and representatives so to amend or interpret said

contract are being challenged on the grounds and in the manner hereinabove set forth, then, and in either of those events, plaintiffs pray the Court to declare that plaintiffs, by so amending and/or interpreting said contract, or by so conferring, negotiating, or bargaining with reference to said amendment or interpretation, are not and shall not become liable in any manner to the individual defendants herein, or to any of them, or to any other person, for any injury or damage which they or any of them may sustain by reason of said amendment, interpretation, conference, negotiation or bargaining."

Certain motions to dismiss were filed by the said Brotherhood based upon the contention that no justiciable issue was presented, R. 53, and that thus the court was without jurisdiction; and by present individual applicants restricted to the alternative relief sought and based upon the contention that in any event the said contract of June 2, 1927, could not be changed where the other two brotherhoods had not been made parties to any of the proceedings. R. 54. All of said motions were overruled by the district court, R. 62, et seq.; R. 101, et seq., and thereafter and following a trial on the merits in which full proof was made by present individual applicants of the charges against the Brotherhood stated above the district judge granted the railways the declaratory relief sought under Item 1 of the foregoing prayer, namely declaring that said railways were not required by law either to amend or to interpret said contract of June 2, 1927, as was desired by the said Brotherhood. R. 329, et seq. An appeal was prosecuted by the said Brotherhood alone to the Fifth Cir-

cuit based upon six specifications of errors which will be discussed below. R. 341, et seq. After hearing there, that court decreed the failure of the complaint to state a justiciable controversy and accordingly sustained the Brotherhood's motion to dismiss for lack of jurisdiction. R. 349, et seq. Motions for rehearings were denied on March 19, 1927, R. 372.

2.

JURISDICTIONAL GROUNDS.

The present applicants and the railways are seeking relief here on the same jurisdictional grounds which were relied upon by the railways as a basis for declaratory relief in the first instance. Judicial Code 24 (8); U. S. C. A., Title 28, paragraph 41, subdivision 8, predicated directly upon paragraph II of the railways' complaint that "this controversy arises under the laws of the United States, namely, the Railway Labor Act of 1934, as amended (45 U. S. C. A., Sections 151 to 164).

This court in the cases of *Steele v. Louisville & Nashville Railway Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187; and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216, granted certiorari to the circuit because of the importance of the question presented in the administration of the Railway Labor Act in its relationship to interstate commerce. The specific question involved in those cases was whether the said Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees

the duty to represent all the employees in the craft without discrimination and if so whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. In the first two of said cases, the discrimination involved was racism. In the last, however, that of the *Wallace Corporation, supra*, racism was not the issue, and there following out the doctrine of both the *Steele* and *Tunstall* cases this Court found in reference to the issue presented, as follows, to-wit:

> "The duties of a bargaining agent selected under the terms of the act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation."

In all three of these cases the court found that a justiciable controversy was presented and that the federal courts do have jurisdiction, as the right of a minority to be protected against unlawful discrimination on the part of its own bargaining agency is without any adequate administrative relief under the act.

Here the Fifth Circuit applied what it termed the general rule enunciated by this court in the cases of *Brotherhood of Locomotive Engineers v. M. K. & T. R. Co.*, 320 U. S. 323; *Switchmen's Union v. National Mediation*, 320 U. S. 297; *Board of Railway Trainmen v. Toledo*, 321 U. S. 413; and *Bradley Lumber Co., v. N. L. R. B.*, 84 Fed.

(2) 97 and held in practical effect that the doctrine of discrimination recognized by this Court in *Steele, Tunstall* and *Wallace, supra*, was restricted to racism, and was not applicable or in any event could not be availed of until after the new agreement is made effective when if there is any just cause injunctive relief will be allowed. The respondent court thus in practical effect while denying its own jurisdiction nevertheless entered a declaratory judgment in which the railways are granted immunity to any liability of any kind either to the Brotherhood or to the Texas employees up to the point where the new agreement is to be made effective but beyond which the whole wrangle is to be renewed and the prospect of injunctive relief in favor of present applicants is to be dealt with. The substance of that decision is summed up in an excerpt from the said opinion quoted in the margin.[1]

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(1) "A consideration of the pleadings and the evidence in the light of the controlling authorities makes it perfectly clear that no justiciable controversy between the railroads and the appealing defendants is alleged or proven. Plaintiffs do not deny, indeed they admit that the Brotherhood is the accredited representative of the employees. They do not allege any fact which shows that they are justiciably concerned in the internal dispute between the members and the Brotherhood. The statute compels the carrier plaintiffs to negotiate collective agreements with accredited representatives. The Brotherhood is the accredited representative. There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable. If, the negotiation completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did, obtain relief from it. For, as was said in Steele's case:

> 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making.'

If, on the other hand, they have no such ground of complaint, the agreement will be binding on them. In either event, plaintiffs-carriers will be protected. In neither event will they have anything to fear."

3.

QUESTIONS PRESENTED.

First, where the railways had signed and fulfilled the obligations of a contract consummated more than fifteen years before involving the allocation and assignment of crews from two separate groups of employees under a consolidated plan in which three brotherhoods are involved, and then are presented with a contract proposing radical changes in the said agreement as to a minority group of employees in one of these brotherhoods alone, and where said railways are threatened with penalites if this new agreement is not made effective by the said Brotherhood, and are threatened by damage suits if it is made effective by the said minority group, and where no labor dispute is involved and there is no administrative remedy whatever under the Railway Labor Act, is a justiciable issue presented that entitles the said railways to declaratory relief of the nature here sought?

Second, in such a declaratory proceeding in which the minority group of the union is joined, and where it is shown that the proposed new agreement involves the grossest kind of discrimination against said group carried out by the bargaining agency in violation of its own constitution and conventions and of the Fifth Amendment to the Constitution of the United States, is the doctrine of the *Steele*, *Tunstall* and *Wallace Corporation* cases to be applied as soon as this invalidity is established and before the new agreement is made effective, or must the minority group suffer the execution and imposition of the new agreement and thereafter seek such injunctive relief and damages as may be available?

Third, is it permissible in any event and assuming that action must be delayed until the new agreement is signed, for the court in denying its own jurisdiction at the same time to declare that the railways will not be subjected to any claim in damages by the minority group suffering prejudice even though the new agreement may be shown to be unlawful?

4.

POINTS RELIED UPON.

The Fifth Circuit was in error of law in respect to the following points:

First, in failing to apply the doctrine of the *Steele, Tunstall and Wallace Corporation* cases, which are definite authority for the principle that under the Railway Labor Act minorities are to be protected against any kind of discrimination on the part of the legal bargaining agency in seeking to amend an existing contract arbitrarily and capriciously and so as to deny to the minority the right to earn a living where the proposed changes are not based on differences relevant to the authorized purposes of the contract.

Second, in ruling in effect that a justiciable issue arises in controversies of the present nature making available judicial remedies only where the discrimination involved is racism.

Third, in refusing in this case because racism was not involved to examine the complaint of the minority on the merits, where even a casual consideration readily reveals that the bargaining agency here is seeking to bring about the proposed discriminatory changes by action which not only represents arbitrary manipulation

of the processes within the Brotherhood in violation of its constitution and by-laws but also in violation of the Fifth Amendment to the Federal Constitution.

Fourth, in virtually closing its eyes to illegal action on the part of the bargaining agency which upon its face is equivalent to fraud, by suggesting that while the minority group in this case cannot prevent the proposed changes in the contract it will be allowed the remedy by injunction after the changes have been consummated if they prove to be invalid.

Fifth, in refusing to grant judicial remedies to proposed action which is shown to be under the facts of the case grossly illegal from its inception, upon the theory that even though this illegality is conceded no effective remedy is to be granted until after the new agreement has been made effective.

Sixth, in refusing to take jurisdiction of the case and in declaring that no justiciable issue is presented and at the same time in practical effect granting a declaratory judgment commanding the railways to negotiate with the bargaining agency of the Brotherhood upon the assurance that no liability can result from this action insofar as the railways are concerned, even though it may be shown to be illegal, and even though after the revision is consummated the aggrieved minority will be entitled to the legal remedies of injunction and damages.

Seventh, in holding that no justiciable issue is here presented where the nature of the complaint is in no sense a labor dispute as such dispute has been interpreted under the Railway Labor Act, and where no administrative remedy of any kind is provided under said act.

5.

Applicants show that the rules of this Court have been fully complied with.

WHEREFORE, applicants pray that an adequate alternative writ of certiorari be granted and that the Circuit Court of Appeals for the Fifth Circuit be required to send up the entire record in this case as is required under the rules of this Court, and that in due time and after further proceedings that said writ be made peremptory and that the judgment and decree of the said respondent court be avoided and reversed and that the judgment of the district court be reinstated and made final, and further for general and equitable relief in the premises.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF JURISDICTIONAL GROUNDS.

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the accompanying Petition at page 10.

STATEMENT OF CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed transcript will be found in the accompanying Petition at page 2, prepared and presented as is required by Rule 12.

SPECIFICATION OF ASSIGNED ERRORS.

A specification of the questions involved and of the errors attributed to the Circuit which are intended to be urged before this Court will be found in the accompanying Petition at pages 13 and 14, all as is required by paragraph 2 of Rule 38.

ARGUMENT.

In its decision rendered herein the Circuit Court has erroneously applied what it designates as the general rule embodied in *Brotherhood of Locomotive Engineers v. M. K. & T. R. Company*, 320 U. S. 323; *Switchmen's Union v. National Mediation*, 320 U. S. 297; *Board of Railway Trainmen v. Toledo*, 321 U. S. 413 and *Bradley Lumber Co. v. N. L. R. B.*, 84 Fed. (2) 97, and has erroneously failed to

apply the doctrine of *Steele v. Louisville & Nashville Railway Company*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 and *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216.

The first group of cases deal strictly with labor disputes where an administrative remedy was afforded by the Railway Labor Act which was not invoked by the complainant before he sought a judicial remedy. The second group of cases deal with the fundamental rights of a minority group in a labor union to invoke judicial remedies to prevent unlawful discriminations by the bargaining agency where there is no administrative remedy under the Railway Labor Act.

Here the arbitrary and gross discrimination on the part of the Brotherhood was shown beyond question, as is shown by the detailed analysis of the merits found in the final opinion of the district court, R. 329, et seq.; and as is fully demonstrated by documents contained in the transcript of this case which need not be reviewed in detail now.

On the merits the district court was called upon to choose between a joint decree of the three brotherhoods under which the rights of the present applicants to maintain in full force and effect the contract of June 2, 1927, was maintained, and a so-called decision by the Board of Appeals of the Brotherhood of Railway Trainmen alone in which the rights of present applicants were arbitrarily denied. The trial court experienced no difficulty in em-

phatically accepting the joint decree and in concluding that arbitrary discrimination was involved in bringing about the decree rendered by the said Board of Appeals; that the Constitution and conventions of the Brotherhood itself had been grossly violated. The facts are fully reviewed in the district court's opinion. R. 329, et seq. Limited excerpts from this opinion will be found in the margin.[1]

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(1) "The general rule is that our Courts should not interfere with such a controversy as here, if it involves nothing more than a construction of the Constitution and laws of the Brotherhood, and the determination of the jurisdiction of the Board of Directors, the Board of Appeals, and the Grand Lodge. Louisville and Nashville Railroad Company, et al. v. Miller, et al., 38 N. E. (2d) 239, 142 A. L. R. 1050.

Further, it follows however that, quoting from 142 A. L. R. 1067, Limitations on general rule:

'As the converse of the general rule that courts will not interfere with decisions made in good faith by appropriate union tribunals acting within the scope of their jurisdiction and power in settling controversies within the union over seniority rights arising out of the union's collective bargaining contract and its constitution, rules and bylaws, it would seem to follow that Courts will protect a union member's seniority rights, so arising, against action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts. So, a union member is entitled to judicial relief from the union's attempt to deprive him without authority of a personal or individual seniority privilege secured by contract with the employer. (Piercy v. Louisville & N. R. Co. (1923) 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322). Similarly, the seniority rights secured to members of a brotherhood by its rules and its contract with a railroad will be respected and protected by the Courts against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution. (Gleason v. Thomas, 117 W. Va. 550, 186 S. E. 304). And it has been said that seniority rights, when recognized and guaranteed by contracts between the employer and a union, inure to the benefit of individual employees, so that the employee may invoke the equity jurisdiction of Courts if full resort to the union tribunals has proved unavailing because of unreasonable construction of union laws or want of good faith on the part of its officers. (Lockwood v. Chitwood, 185 Okla. 44, 89 P. (2) 951).'

. . . . . .

A fortiori, however, are they entitled to an answer, since we are going to hold in this opinion that the Board of Appeals was absolutely without jurisdiction, and its action, consequently, was null and void. The action of the three executives of the brotherhood maintaining the original contract of June 2, 1927, is final, though subject to appeal to the directors or to the convention of the Brotherhood of Railroad Trainmen—the latter provision for an appeal being not important since

The Circuit Court did not consider or pass upon the merits of the case. That Court declared outright that no justiciable controversy was presented, as the issue of racism was not involved. Excerpts from the opinion of the court sustaining the correctness of this statement are shown in the margin.[2]

There is nothing in the *Steele* and *Tunstall* cases and certainly nothing in the case of *Wallace Corporation*, all referred to above, to justify the conclusion that the remedies allowed in those cases are restricted to instances where the discrimination involved is racism. Recently where the issue was not racism, this Court plainly implied that the doctrine of discrimination was available even as to an individual employee where a question of fundamental seniority right was involved and apparently only denied the availability of the doctrine there because the issue had

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(1) Continued

it has not been taken. Additionally the limitations of time have run and the appeal is precluded.

. . . . . .

(a) The decision by the joint executives of the three brotherhoods is empowered by Section 86, Interpretation of Laws, which is found under the main division "Grand Lodge" of the Constitution, in part reading as follows:

'The provisions of this Constitution shall be interpreted and construed according to their most plain and obvious meaning, and should any doubt arise as to the proper construction of any section or rule thereof it shall be referred to the President of the Brotherhood, whose decision shall be final, unless reversed by the Board of Directors or by the Grand Lodge.' " Tr. 330, et seq.

(2) "We think it may not be doubted: that the complaint presented no justiciable controversy; that it was fundamental error not to grant the motion to dismiss; and that the judgment must be reversed and the cause remanded with directions to dismiss the suit. We, therefore, do not reach the second question, whether the judgment was right on the merits.

. . . . . .

. . . . . In sustaining the right of Steele and Tunstall to judicial relief, it (referring to this Court) took the greatest pains to point out that it sustained their rights because, with the Union acting adversely on racial grounds to the very per- (fol. 358) sons they were supposed to represent, the constitutional right of the plaintiffs not to be so discriminated against would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such duty or obligation." R. 355, et seq.

become "*res adjudicata*" upon the basis of action had in a prior suit.[3] On the contrary it is the unequivocal doctrine of these cases that the bargaining agency is the agent of all of the employees charged with the responsibility of representing their interests fairly and impartially. In the *Steele* case, *supra*, this Court made declarations quoted in the margin from *Trailmobile Co. v. Whirls*[3], *supra*,

[3] "We also agree that the question of unlawful discrimination is not properly before us for decision. That question, insofar as it arose from events prior to this litigation, was involved in the Ohio class suit without reference, it would seem, to § 8 or its possible effects. And because the petition for certiorari, as we have noted, assigned no error to the Court of Appeals' ruling on the issue of "res judicata" arising from the outcome of the class suit, we are not at liberty now to consider the effect of that litigation or the issues of discrimination embraced in it. Insofar as any question of unlawful discrimination may be thought to arise from the facts said to have taken place after the decision of the Court of Appeals, we are also not free at this time to consider or determine such an issue. As the brief of the Government in respondent's behalf pertinently states, 'These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party to the issue of unfair discrimination. Cf. Hormel v. Helvering, 312 U. S. 552, 556, 61 S. Ct. 719, 721, 85 L. Ed. 1037. In view of that fact, and of the Hess litigation, we believe that it would be inappropriate, at this state, to argue these issues.'" Trailmobile Co., et al. v. Whirls, 67 S. Ct. 987.

From the dissenting opinion, we quote the following:

"We have held under a similar Act that the courts may intervene to prevent a majority union from negotiating a contract in favor of itself against a colored minority. Speaking for all but two members of the Court, Chief Justice Stone, after recognizing that the representatives may make 'contracts which may have unfavorable effects on some of the members of the craft represented' in such matters as seniority, based on relevent differences of conditions, said: 'Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences.' Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192, 203, 65 S. Ct. 226, 232, 89 L. Ed. 123. That opinion also declared that 'It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.' 323 U. S. at page 202, 65 S. Ct. at page 232, 89 L. Ed. 173. And in Tunstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187, we held that where an individual is without available administrative remedies, the courts must grant him protection." Trailmobile Co. v. Whirls, 67 S. Ct. 996.

showing that the Court had in mind any kind of discrimination of an obviously irrelevant and invidious nature. It was pointed out there that a change in an existing contract dealing with the rights of employees and effecting wages, hours and working conditions would not be sanctioned as legal and binding where such proposed change was not based on differences relevant to the authorized purposes of the contract. There this Court placed stress upon the fact that in such cases there is no adequate available administrative remedy under the Railway Labor Act. The Court said this:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction . . ."
>
> . . . . . .
>
> "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making."

Here the Circuit Court apparently recognizes that present applicants will be entitled to some kind of relief after the new agreement has been made operative. There

is nothing in any jurisprudence that sanctions this idea. In this connection the court below made these observations which we repeat for emphasis:

> . . . "The Brotherhood is the accredited representative. There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable. If, the negotiation completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did obtain relief from it. For, as was said in Steele's case:
>
> 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making'.
>
> If, on the other hand, they have no such ground of complaint, the agreement will be binding on them. In either (fol. 361) event, plaintiffs-carriers will be protected. In neither event will they have anything to fear." R. 359.

Thus the court denying its own jurisdiction, nevertheless, attempts to grant a declaratory judgment in effect commanding the railways to negotiate with the bargaining agency of the Brotherhood upon an extra legal assurance that no liability can result from this action insofar as the railways are concerned, and at the same time suggesting that if the revised contract is illegal the aggrieved minority is to abide its time until it is made effective and then is to invoke such judicial remedies as may be available. It is a strange doctrine to suggest that an illegal action can only be enjoined after it has been committed, and thus at a time when at least some damage of an irreparable nature may have resulted from it. There would seem to be no good reason why the Railway Labor Act should be interpreted so as to justify illegal action in its inception that can thereafter not only be enjoined but used as a predicate for a damage suit. In the *Steele* case this Court made the following statement:

> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."

It is true that both in the *Tunstall* and *Steele* cases the specific issue as to whether damages could be recovered from the railways was apparently not presented. In the *Tunstall* case, however, we find the following observation:

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by

> the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequence of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted."

If the Circuit Court was warranted in concluding that a justiciable issue was not involved, it certainly had no right to say what the liability of the railways may prove to be under the contract of June 2nd, if at some time following the effective date of the proposed change this aggrieved minority should assert a claim in damages which by the authority of this Court is thus left by the statute to judicial determination.

The Circuit Court's observations as to the railways ultimate liability and its further observations as to the present applicants' remedy by injunction is certainly not "*res adjudicata*" or determinative of either issue, and cannot be unless a justiciable issue had been presented. If a justiciable issue is presented then the Court should proceed now to decide whether the proposed change is valid and proper, or whether it is capricious and of such discriminating character as warrants the application of the doctrine of the *Steele, Tunstall* and *Wallace Corporation* cases, *supra.*

We are satisfied that under the customary practice of this Court if the writs sought herein are granted

and are ultimately made peremptory that the Court will desire to remand this case to the Circuit for further consideration upon the merits, and for this reason we do not deem it necessary or proper to enter into a full discussion of the factual questions presented upon this phase of the case. It would seem sufficient in any event to again refer this Court to the discussion of these facts contained in the written opinion of the district judge, R. 62, in which he designated the action of the bargaining agency here as inherently invalid; and to remind this Court that in the decision rendered by the Circuit Court the merits of the case were not considered.

CONCLUSION.

Applicants respectfully submit that the writs herein sought should be granted and in due time should be made peremptory, and accordingly that the judgment and decree of the Fifth Circuit should be avoided and reversed, and that the decision of the district court should be reinstated and made final, or in the alternative this case should be remanded to the Fifth Circuit to be there considered and decided upon the merits of the controversy.

Respectfully submitted,

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[illegible]

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

Versus

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

Brief on Behalf of Respondents in Opposition to Petitions for Writs of Certiorari to United States Circuit Court of Appeals, Fifth Circuit.

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FEDERAL RULES OF CIVIL PROCEDURE

UNITED STATES CODE, ANNOTATED

Nos. 1500, 1501

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1946

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

Versus

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

Brief on Behalf of Respondents in Opposition to Petitions for Writs of Certiorari

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Notwithstanding the fact that the petitioners have supplied a statement of the case, which is generally correct, a more detailed recitation of the facts is deemed desirable to show the correctness of the decision of the United States Circuit Court of Appeals, Fifth Circuit.

STATEMENT OF FACTS

During the year 1926, the Texas and Pacific Railway Company and the Missouri Pacific Railroad Company consolidated their facilities covering the manning of yard and hostler service in the Alexandria Terminal, Alexandria, Louisiana, and made all of these facilities one common interchangeable yard. The interests of the two sets of employees for the two carriers, represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, became involved. A controversy followed. The respective committees of the three labor organizations having jurisdiction over the terminal facilities, being unable to agree as to the disposition of the issues, invoked the assistance of national officers. An agreement was reached in St. Louis on June 2, 1927, (R. 12-15) and made effective June 20, 1927, jointly executed by a duly authorized representative of each organization, whereby the work in the terminal was apportioned between the employees of the two railroads based upon the ratio of business done at that time by the two carriers at the joint terminal.

Thereafter, J. H. Bromley and R. L. Hickman, both members of Rapides Lodge No. 856 of the Brotherhood of Railroad Trainmen, requested a change in apportionment of work in the Alexandria Terminal on account of the increased ratio of business handled by the Missouri Pacific Railroad in and out of the Alex-

andria Terminal over the ratio of business done by the Texas and Pacific. The request for a change in the apportionment of work was denied by a decision of the chief executives of the three national brotherhoods. An appeal was perfected to the Board of Appeals of the Brotherhood of Railroad Trainmen, and on November 16, 1943, (R. 185-194) the said Board of Appeals reversed the decision of the chief executives, and among other things held:

> "The fact that Grand Lodge officers of the three organizations were assigned with general committees of the M. P. and T. & P. Railways as a result of contention of the M. P. men that increase in their proportion of work in the terminal justified a change in the percentage established in 1927 indicates to this board that the Chief Executives recognized that a change in the 1927 percentage figures could be made if such a change was justified. Further, the Board cannot agree that fluctuations of 'ten percent in 1940, twelve percent in 1941 and twenty percent for 7 months in 1942' indicating a progressive increased disparity between the business handled by the two properties, 'does not constitute a change in conditions under the law and policy of our organization,' as held by Vice President Smith and his associate officers."

The Brotherhood of Railroad Trainmen has been making efforts to place into execution the decision of the Board of Appeals since the date of its rendition. The Brotherhood of Railroad Trainmen was tem-

porarily restrained by an order of the 19th Judicial District Court, State of Louisiana, in Bujol et al., v. Missouri Pacific Railroad Company, et al., No. 21,579, from putting into effect the decision of the Board of Appeals. The temporary restraining order was dissolved by the 19th Judicial District Court of the State of Louisiana, after hearing on a rule nisi, and the suit was dismissed at the costs of the plaintiffs. An appeal was perfected to the Supreme Court of Louisiana by the plaintiffs in that case and there the matter rests at the present time.

In the meantime, counsel for the plaintiffs in the Bujol case notified the Texas & Pacific Railway Company that his clients would sue for damages if the contract of June 2, 1927, effective June 20, 1927, were changed under the decision rendered by the Board of Appeals of the Brotherhood of Railroad Trainmen.

The foregoing chronological history of the facts lead to the present litigation. Prior to the institution of the complaint in the lower court, repeated efforts were made by the duly authorized agents of the Brotherhood of Railroad Trainmen to work out a change in the apportionment of work from 55 - 45 to one of 65 - 35, as between Missouri-Pacific and Texas & Pacific yardmen, but the threat of damage suits by the plaintiffs in the Bujol case allegedly prevented the two railroads from perfecting a change as ordered by the Board of Appeals of the Brotherhood of Railroad Trainmen.

STATEMENT OF THE CASE

Basing jurisdiction on diversity of citizenship and on the Railway Labor Act (45 U. S. C. A. §§ 151-164), the carriers filed suit in the District Court of the United States, Western District of Louisiana, against respondents and the individual petitioners herein, seeking a declaratory judgment under Section 274d of the Judicial Code (28 U. S. C. A. § 400) in accordance with the original and amended prayer of their complaint. (R. 10 and R. 124-126, inclusive). It was alleged that respondents were demanding the carriers to negotiate with them regarding a change in the apportionment of work stipulated in the agreement for yard operations in the joint yards at Alexandria, Louisiana, negotiated June 2, 1927, (R. 12-15), while the individual defendants were threatening to sue if a change were made.

Respondents filed a motion to dismiss the complaint for lack of jurisdiction of the subject matter, asserting that:

> "The matter in controversy herein is not one of a justiciable nature, and consequently, not subject to judicial review, it being a labor dispute under the Railway Labor Act, 45 U. S. C.A. sec. 151 et seq., and one over which Congress has foreclosed resort to the Courts for enforcement of the claims asserted by plaintiffs." (R. 53).

The decision of the District Court denying the motion to dismiss (R. 62-101) is reported in 60 F.

Supp. 263. The respondents then filed an original and amended answer (R. 102 and 121) admitting that there was a dispute between them and some of their members, as alleged, but denying that the dispute had any just basis in law or in fact. Pointing out that the Railway Labor Board compels the carriers to bargain with the accredited representatives of employees, and that the carriers admitting that the Brotherhood is such an accredited representative, respondents insisted that the existence of the dispute with some of their members supplied no justiciable controversy between them and the carriers, and hence no basis for a declaratory judgment.

A trial on the merits was had and the District Court held that the carriers were not required to amend and to interpret the contract of June 2, 1927, or to confer, negotiate or bargain with the Brotherhood of Railroad Trainmen in its desire to amend and to interpret said contract. The decision on the merits (R. 329-339), is reported in 63 F. Supp. 640. An appeal to the United States Circuit Court of Appeals, Fifth Circuit, was perfected. Six errors were specified, the first two dealing with the lack of jurisdiction over the subject matter and the erroneous action of the lower court in denying the motion to dismiss.

The Circuit Court of Appeals reversed the trial judge (R. 249-359). The opinion is reported in 159 F. 2d 822. (Advance Sheet No. 5, April 14, 1947). The Court held specifically that the complaint presented

no justiciable controversy and that it was a fundamental error on the part of the trial judge not to grant the motion to dismiss. Consequently, the judgment of the lower court was reversed and the cause remanded with directions to dismiss the suit.

ARGUMENT

It is our serious contention that the petitions for a writ of certiorari are without merit and should be denied. Careful study of the decision rendered by the United States Circuit Court of Appeals amply justifies this position. Not only did that Court hold that the complaint presented no justiciable controversy, but it further stated in part that:

> "*** *There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood.*" (Emphasis supplied).

Throughout, respondents have contended that Congress, by the enactment of the Railway Labor Act, has foreclosed resort to the courts for enforcement of the claims asserted by the carriers. The aim of the Railway Labor Act was to obtain simplicity and directness, both in the administrative procedure and on judicial review.

In order to get a clear and concise picture of the aim of the Act, it is necessary to review the pronounced

general purposes of the legislation, which are itemized in 45 U. S. C. A., § 151a. In view of the fact that the carriers alleged that this controversy arose under the Railway Labor Act, it necessarily follows that it must be settled under the provisions of that statute. When consideration is given to the stipulated purposes bearing Nos. 4 and 5 in § 151a, it is manifest that they are applicable to this dispute. If any command should appear in the Act whereby judicial remedy is afforded to enforce any one of the several purposes of the statute, an adherence of that remedy in the courts must prevail. In the absence of any such command, the disposition must be had through the medium of administrative machinery, which means negotiation, arbitration and mediation.

It was specifically held by this Honorable Court in General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co. et al., 320 U. S., 323, 64 S. Ct. 146, that the command of the Railway Labor Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. In short, the jurisdiction of a suit under the Railway Labor Act does not exist unless the plaintiff shows a legal right enforceable by the courts. That case supplied a test and furnished a yardstick of guidance for future determination of controversies arising under the statute involved. It was said:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d., Cong., 2nd. Sess., p. 2. Courts should not rush in where Congress has not been chosen to tread.

"We are concerned solely with the legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction by reason of § 24 (8) of the Judicial Code, 28 U.S.C., § 41 (8), 28 U.S.C.A. § 41 (8). Cf. People of Puerto Rico v. Russell & Co., 288 U. S. 476, 483, 53 S. Ct. 447, 449, 77 L. Ed., 903; Gully v. First Nat. Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed., 70; Peyton v. Railway Express Agency, 316 U. S. 350, 352, 62 S. Ct. 1171, 1172, 86 L. Ed., 1525. When a court has jurisdiction it has of course 'authority to decide the case either way.' The Fair v. Kohler Die & Specialty Co., 228 U. S., 22, 25, 33, S. Ct., 410, 411, 57 L. Ed. 716. But in this

> case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer."

There is no general provision for judicial review embodied in the Railway Labor Act. Congress expressly provided for judicial review in only two instances. In this connection, attention is directed to the decision rendered in Switchmen's Union of North America v. National Mediation Board, 320 U. S., 297, 64 S. Ct. 95, at page 99, to-wit:

> "Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of 'grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.' § 3, First (i), 45 U. S. C. A. § 153, subd. 1 (i). The various divisions of the Adjustment Board have authority to make awards. § 3, First (k)-(o). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits 'the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' The other instance in the Act where Congress provided for judicial review is under § 9, 45 U. S. C. A. § 159. The Act prescribes machinery for the voluntary arbitration of labor controversies. § 5, Third; § 7; § 8, 45 U. S. C. A. §§ 155, subd. 3, 157, 158. It is provided in § 9 that an award of a board of arbitration may be impeached by an action instituted

> in a federal district court on the grounds specified in § 9, one of which is that 'the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act." § 9, Third (a). When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act."

Likewise, it was shown that the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until 1926 the legal sanction to the various statutes had been few for the reason empasis of the legislation had been on conciliation and mediation. However, since 1926 there has been an increase in number of legally enforcible commands incorporated in the Railway Labor Act. Congress has utilized administrative machinery more freely in the settlement of disputes. It was further held:

> "But large areas of the field still remain in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject

has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the Missouri-Kansas-Texas R. Co. case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

This Honorable Court, in deciding the case from which the quotation above is a part, held that it was for Congress to determine how the rights which it creates shall be enforced. In passing on this point it was said that in such a case the specification of one remedy normally excludes another. It was further stated:

"Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. When Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nontheless supplied. See United States v. Griffin, 303 U. S. 226, 232-237, 58 S. Ct. 601, 604-606, 82 L. Ed. 764."

In Brotherhood of Railroad Trainmen et al. v. Toledo, P. & W. R. R., 321 U. S. 413, 64 S. Ct. 413, 418, it was said:

"The Policy of the Railway Labor Act was to encourage use of nonjudicial processes of negotia-

tion, mediation and arbitration for the adjustment of labor disputes. Cf. General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 320 U. S. 338, 64 S. Ct. 142."

We shall now pass on to further consideration of specific provisions of the Railway Labor Act. It is provided in Section 2 of the statute, paragraph first, 45 U. S. C. A., § 152 that it is the mandatory duty of all carriers to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. Notwithstanding this provision, the two carriers sought a declaratory judgment in the lower court and the primary demand of their prayer was to the effect that they should not be required to negotiate or sign an agreement with the Brotherhood of Railroad Trainmen amending or interpreting the contract of June 2, 1927.

The history of the Railway Labor Act and its particular provisions have a special claim here. Judicial power is sought to be exerted in the enforcement of a right which plaintiffs claim that Congress created. It seems plain that Congress selected a very limited class of disputes to be solved by the courts, while it chose a different machinery for the settlement and adjustment of other controversies. The conclusion is inescapable that Congress carved out of the field of

conciliation, mediation and arbitration only the very select list of problems that it was willing to place in the adjudicatory channel. The remaining bulk was left to the voluntary processes long encouraged by Congress for the protection of interstate commerce from an industrial strife. As was said recently by the Supreme Court, in discussing this phase of the statute, "The concept of mediation is the antithesis of justiciability."

To show conclusively that no justiciable controversy is presented in this case, the decision rendered in General Committee v. Missouri-Kansas-Texas R. Co., supra, has peculiar applicability. There it was said:

> "But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by § 5, First, Congress provided that either party to a dispute might invcke the services of the Mediation Board in a 'dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable' to the Adjustment Board and 'not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. § 5, First and Third, § 7. In case both fail there is the Emergency Board which may be established

by the President under § 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

Petitioners seem to rely strongly upon the decision of Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226. A close study and analysis of that case will show that no comfort is offered therein to support the position, as there is no similarity of facts or of law applicable thereto. The late Chief Justice Stone was organ of the Court and he plainly stated in the first paragraph of the opinion that the question was whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because

of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. With the question stated, what possible bearing could that case have directly upon the outcome of this litigation? Nothing is definitely the answer.

It is deemed advisable to point out the several glaring differences embodied in the present dispute. *First, no question of discrimination on account of racism is involved in this proceeding, whereby such existed in the cited case. Secondly, the question here is restricted by the Railway Labor Act to adjustment by recourse to the traditional implements of mediation, conciliation and arbitration or is determinable under the administrative scheme provided by the statute, while there was complete absence of procedure for settlement of the dispute under the Act in the adjudicated case. Thirdly, it was specially held in the Steele Case that the petitioner was without available administrative remedy, resort to which, when available, is prerequisite to equitable relief in the federal courts and that the Railway Labor Act condemned as unlawful the coduct of the carrier. Fourthly, the Brotherhood of Railroad Trainmen is not attempting to commit an illegal act. Finally, in the Steele Case, there were no differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.*

The holding announced in Elgin, J. & E. Ry. Co., v. Burley, et al., 65 S. Ct. 1282, 325 U. S. 711, 66 S. Ct.

721, 327 U. S. 661, appears peculiarly applicable. In the first decision rendered in this case, which was later sustained on the rehearing, it was said:

> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. *For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.*" (Emphasis supplied).

It was very pointedly explained in the dissenting opinion of the case quoted from above that rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. Likewise, it was shown that to an increasing extent, courts require dissidents within a union to seek interpretation of the organization's rules and to seek redress for grievances arising out of them before appropriate union tribunals.

The Declaratory Judgment Act specifically provides that a declaratory judgment or decree may be granted whenever necessary or proper. It is submitted that

such a decree by the lower court in this case was not proper for the very simple reason the trial court was without jurisdiction. It is provided in Rule 57 of the Rules of Civil Procedure dealing with declaratory judgments that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

Again it is submitted that a declaratory judgment should not have been entered in this proceeding, because such was not appropriate. The basis of this broad statement is traceable to the decision rendered in Bradley Lumber Co., v. National Labor Relations Board (CCA 5), 84 F, (2d) 97, cert. den., 299 U. S. 559, 57 S. Ct. 21, 81 L. Ed. 411, where it was held.

> "The power to render a declaratory judgment does not authorize a court to interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with them under its power to enjoin."

Petitioners in the present proceeding did not venture to contend that the lower court should use its equity jurisdiction and enjoin the Brotherhood of Railroad Trainmen from making effective the decision of its Board of Appeals whereby the agreement of June 2, effective June 20, 1927, would be changed. The provisons of the Norris-LaGuardia Act, 29 U. S. C. A. § 108, would prevent the issuance of injunctive relief.

It was specifically held in Brotherhood of Railroad Trainmen et al. v. Toledo, P. & W. R. R., supra, that the overall policy of the Norris-LaGuardia Act was to encourage the use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes, as its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy and to make injunction a last line of defense available not only after other legally required methods, but after all reasonable methods as well, had been tried and found wanting. It was also said in that case that under the Norris-LaGuardia Act, injunctive relief could be granted only when the complainant had complied with all legal obligations, and had made every reasonable effort to settle the dispute by negotiation and by available governmental machinery of mediation and by available governmental machinery of voluntary arbitration.

There can be no doubt but that the United States Circuit Court of Appeals correctly stated that the cases relied upon by respondents reflect the general rule. The broad scope and binding force of the general rule declared in the Switchmen's Union and General Committee cases in 320 U. S. cannot be ignored or explained away. The complaint of the carriers is silent and completely devoid of any allegation showing that they are justiciably concerned in the internal dispute between the members and the Brotherhood of Railroad Trainmen. The Court of Appeals very pointedly noted that fact. It must be remembered that the carriers are

under a statutory duty to negotiate with the Brotherhood, the accredited representative. Likewise, in default of negotiation, the carriers are subjected to rather severe penalties.

Since the Court of Appeals reached the conclusion that the complaint presented no justiciable controversy and that it was a fundamental error on the part of the trial court not to grant the motion to dismiss, it logically stated that:

> "We, therefore, do not reach the second question, whether the judgment was right on the merits."

CONCLUSION

When the pleadings and evidence are considered along with the controlling cases decided by this Honorable Court, cited and quoted from herein, it becomes crystal clear that no justiciable controversy between the carriers and respondents has been alleged or proven. Manifestly, the decision of the Court of Appeals is correct in every aspect. It is submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

KEMBLE K. KENNEDY,
Attorney for Respondents,
Brotherhood of Railroad Trainmen and
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704 Louisiana National Bank Bldg.,
Baton Rouge, Louisiana.

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SUPREME COURT OF THE UNITED STATES

No. 137

BROTHERHOOD OF RAILWAY TRAINMEN, ET AL

versus

TEXAS & PACIFIC RAILWAY COMPANY, ET AL

PETITION FOR REHEARING AND FOR VACATING ORDER OF COURT DENYING WRIT OF CERTIORARI ENTERED BY THE COURT ON THE 13TH DAY OF OCTOBER, 1947,

And

FOR RECONSIDERATION OF THE QUESTION AND ISSUES PRESENTED.

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Of Counsel:
DUPONT & DUPONT
Plaquemine, Louisiana

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And

FOR RECONSIDERATION OF THE QUESTION AND ISSUES PRESENTED.

TO THE HONORABLE, THE SUPREME COURT
OF THE UNITED STATES:

Petitioners, Texas-Pacific Employees, file this application for rehearing under Rule 33 of this Court seeking to obtain action by the Court vacating the order denying the writ of certiorari sought herein entered by the Court on the 13th day of October, 1947, and after such revocation asking that the whole subject matter of the said petition for certiorari be reconsidered, and that the writs sought therein be granted as prayed for in said petition.

1.

The procedural aspects of the present application have been treated by the Court in a number of cases, and the remedies sought have been allowed.[1]

2.

For the purpose of the present petition, petitioners reiterate all of the allegations of the original petition for the writ, and reiterate all of the contentions in support thereof which were contained in the supporting brief filed simultaneous therewith.

3.

Petitioners likewise adopt all of the allegations of a petition for rehearing similar to the present which has been or will be filed on behalf of the Railways, and all of the contentions and arguments that will be made in support of the latter petition insofar as these arguments and contentions are consistent with the legal interest of the said Texas-Pacific Employees in the issues here presented.

4.

Petitioners show further that the issues of this case not only present important questions "affecting the application and operation" of the Railway Labor Act, which should be resolved by this Court, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 713,* and questions of "importance in the orderly administration of the Railway Labor Act," *The Order of Railway Conductors of America, et al v. O. E. Swan, et al, 15 Law Week 4146, 4147,*

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1. Buie v. United States, 317 U. S. 689, 87 L. Ed. _____, 63 Sup. Ct. 256; Aguilar v. Standard Oil Co., 317 U. S. 622, 87 L. Ed. _____, 63 Sup. Ct. 433; Frankfurter and Fisher, 51 Harv. L. Rev. 577, 579.

cited by this Court on January 13, 1947; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210; Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 194;* but that the said issues and questions should be reconsidered in the light of the Taft-Hartley Act, H. R. 3020, 61 Statutes at Large, Chapter 120, Public Law 101, 29 USCA, Sections 141-197, enacted by Congress in the 80th Session and made effective on the 23rd day of June, 1947.

5.

The ruling of the Circuit sought to be here corrected amounts to this, namely, the bargaining agency of a labor union can make effective an illegal agreement with the employer grossly discriminating against a minority group of employees within the union and consummated in violation of the law and constitution of the union without the minority group having any remedy until damage has been suffered, and without the employer having the right to invoke declaratory relief such as is here sought even though the employer by the findings of this Court will be liable to the minority group for the damage so suffered.[2]

6.

The court below dealt with the case as if the union is now proposing to negotiate a new agreement governing the apportionment of Missouri-Pacific and Texas-Pacific Employees. That is indicated in this language which we quote in the footnote below.[3]

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2. Steele and Tunstall cases, supra.

3. "The Brotherhood is the accredited representative . . . . . The carriers are under a statutory duty to negotiate with the Brotherhood . . . . . If, the negotiation completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did, obtain relief from it."

7.

Actually, the transcript filed here clearly reveals that wl this declaratory proceeding was initiated by the Railways union was not proposing to negotiate in any sense where rights of all of its members would be protected. Indeed, union was not proposing to do anything except to make effect the illegal and unconstitutional decree of its Board of Appe to vacate and avoid the allocation of employees as fixed in contract of June 2, 1927, and to substitute in lieu thereof new and discriminating apportionment which was sanctioned said illegal decree. The only negotiation this Court has e recognized as between the bargaining agency of a union and employer is an open one where the rights of all the members to be considered. Such negotiation was plainly not here involv

8.

The declaratory proceedings here should be sustained only to protect the Railways against the damage claim which immediately arise when the new agreement is made effective also to protect the Brotherhood itself against a damage suit the part of the said minority group, as is allowed under Sect 301, Title III of the said Taft-Hartley law.

WHEREFORE, petitioners pray that this rehearing allowed, and accordingly that appropriate action be taken the Court vacating the order denying the writ of certiorari o inally sought herein, entered by the Court on the 13th day October, 1947, and after further due proceedings that there a reconsideration of the issues and questions presented and due time that an alternative writ of certiorari be granted, that the Circuit Court of Appeals for the Fifth Circuit be

quired to send up the entire record in this case as is required under the rules of this Court, and that after further due proceedings that said writ be made peremptory and that the judgment and decree of the said respondent Court be avoided and reversed, and that the judgment of the district court be reinstated and made final.

Further for general and equitable relief in the premises.

By Attorney,

FRED G. BETON
1016 La. National Bank Bldg.

Of Counsel:
Dupont & Dupont
Plaquemine, Louisiana

Baton Rouge, Louisiana
Attorneys for Applicants
Texas-Pacific Employees

Certificate of Counsel

We, Dupont & Dupont of Plaquemine, Louisiana, and Fred G. Benton of Baton Rouge, Louisiana, hereby certify that we are the attorneys and of counsel for the Texas-Pacific Employees in the above cause, an applicant for a writ of certiorari in these proceedings, and that the foregoing petition for rehearing is not presented for purposes of delay or vexation, but is in our opinion well founded in law and fact and proper to be filed herein; that a copy of this petition for rehearing has been served by mailing in the United States mails to J. T. Suggs, Texas & Pacific Bldg., Dallas, Texas; M. E. Clinton, Missouri-Kansas-Texas Bldg., Dallas, Texas; Esmond Phelps, United Fruit Bldg., New Orleans, La.; Frank H. Peterman, 909 Sixth Street, Alexandria, La.; H. Payne Breazeale, 517 North Third Street, Baton Rouge, La.; Attorneys for The Texas and Pacific Railway Company; Thomas T. Railey, Missouri Pacific Bldg., St. Louis, Mo.; Murray Hudson and Fred G. Hudson, Jr., Monroe, La.; Attorneys for Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, and Kemble K. Kennedy, La. National Bank Bldg., Baton Rouge, La.; Attorney for Brotherhood of Railroad Trainmen and Rapides Lodge No. 856 of the Brotherhood of Railroad Trainmen, representing all of the interested parties.

Dupont & Dupont

By _____

Plaquemine, Louisiana

_____

FRED G. BENTON

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Baton Rouge, Louisiana

Attorneys for Applicants

Texas-Pacific Employees